

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

DOCKET  
NUMBER

U.S. DISTRICT COURT  
WEST. DIST. OF WISCONSIN

SEP 17 2002

FILED/RECEIVED  
JOSEPH W. SKUPNIEWITZ, CLERK

CASE  
NUMBER

NEIL GAIMAN and  
MARVELS AND MIRACLES, LLC,

Plaintiffs,

v.

TODD McFARLANE, et al.

Defendants-Counterclaimants.

Case No. 02-C-0048-S

03-1461

**REVISED JOINT FINAL PRE-TRIAL CONFERENCE REPORT**

The parties, by their respective counsel, hereby submit this Revised Joint Final Pre-Trial Report in accordance with the Court's March 5, 2002 Preliminary Pre-Trial Conference Order.

**A. FINAL PRE-TRIAL CONFERENCE DATE AND APPEARANCES**

**Final Pre-Trial Conference:** Tuesday, September 3, 2002 at 1:00 p.m.

**Appearances:** Plaintiffs Neil Gaiman and Marvel and Miracles, LLC will appear by their counsel, Allen A. Arntsen and Jeffrey A. Simmons of Foley & Lardner, and Kenneth F. Levin of Kenneth F. Levin and Associates.

Defendants Todd McFarlane, Todd McFarlane Productions, Inc., TMP International, Inc., and McFarlane Worldwide, Inc., will appear by their counsel, Michael A. Kahn and Peter W. Salsich, III of Blackwell, Sanders, Peper, Martin, LLP, and Eugenia G. Carter and Todd G. Smith of La Follette Godfrey & Kahn.

Defendant Image Comics, Inc. will appear by its counsel, R. Scott Feldmann of Brobeck, Phleger & Harrison, LLP.

U.S.C.A.—7th Circuit

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03-1461-L10

**B. AGREED STATEMENT OF UNCONTESTED FACTS**

1. The plaintiffs filed this lawsuit on January 24, 2002.
2. Plaintiff Neil Gaiman is a resident of the Western District of Wisconsin, and has been a resident of the Western District of Wisconsin during all times relevant to this action.
3. Plaintiff MARVELS AND MIRACLES, L.L.C., (hereafter “MARVELS AND MIRACLES”) is a Wisconsin Limited Liability Company, having a principal place of business in the Western District of Wisconsin.
4. Defendant Todd McFarlane is a resident of Arizona.
5. Mr. McFarlane is the sole shareholder of defendants Todd McFarlane Productions, Inc., TMP International, Inc. and McFarlane Worldwide, Inc.
6. Mr. McFarlane is the president of defendant Todd McFarlane Productions, Inc.
7. Defendant Todd McFarlane Productions, Inc. (hereafter “Todd McFarlane Productions”) is a corporation organized under the laws of the State of Arizona having a principal place of business at 40 West Baseline Rd., Tempe, Arizona 85283.
8. Todd McFarlane Productions is engaged in the production of comic books and related works of entertainment.
9. Defendant TMP International, Inc. (hereafter “TMP International”) is a corporation organized under the laws of the State of Michigan.
10. Defendant McFarlane Worldwide, Inc. (hereafter “McFarlane Worldwide”) is a corporation organized under the laws of the State of Michigan.
11. Defendant Image Comics, Inc. (hereafter “Image Comics”) is a corporation organized under the laws of the State of California having a principal place of business at 1071 N. Batavia St. Orange, California 92867.

12. Mr. McFarlane is the president of Image Comics.

13. Mr. McFarlane and six other comic book artists formed Image Comics in late 1991 or early 1992 in order to publish their own works.

14. Image Comics currently has four shareholders.

15. Mr. McFarlane has been a shareholder of Image Comics since the founding of the company.

16. Shortly after forming Image Comics, Mr. McFarlane also founded Todd McFarlane Productions.

17. Prior to forming Image Comics and Todd McFarlane Productions, Mr. McFarlane worked for D.C. Comics and Marvel Comics at various times and had written contracts with D.C. Comics and Marvel Comics for some of his work.

18. Todd McFarlane Productions has published the *Spawn* series of comic books since 1992.

19. In 1992, Mr. McFarlane asked four prominent comic book authors to write issues of *Spawn*. Neil Gaiman was one of those four authors.

20. Mr. Gaiman wrote the script for issue 9 of *Spawn* (hereafter "*Spawn* Issue 9").

21. Mr. Gaiman also created preliminary or "thumbnail" sketches for *Spawn* Issue 9.

22. Mr. McFarlane created the artwork printed in *Spawn* Issue 9.

23. Mr. Gaiman's script for *Spawn* Issue 9 included three characters that had never appeared in a prior issue of *Spawn*: "Angela," "Count Nicholas Cagliostro" (hereafter "Cagliostro") and an unnamed character from the Middle Ages that later came to be known as "Medieval Spawn." All three of those characters appeared in *Spawn* Issue 9 when it was published.

24. The Medieval Spawn character that appears in *Spawn* Issue 9 is a different version of the “Spawn” character who is the main character in the *Spawn* series.

25. The Angela and Cagliostro characters were not based upon any pre-existing comic book characters.

26. *Spawn* Issue 9 was published in March of 1993.

27. *Spawn* Issue 9 contains the following notice: “Spawn and its logo are trademark<sup>TM</sup> and copyright © 1993 Todd McFarlane Productions, Inc. All rights reserved.”

28. Gaiman received a copy of *Spawn* Issue 9 on or before April, 1993.

29 Shortly after publication of *Spawn* Issue 9, TMP International began selling action figure toys of the Angela and Medieval Spawn characters.

30. After the publication of *Spawn* Issue 9, Mr. McFarlane agreed to have Mr. Gaiman author the scripts for a three-issue comic book mini-series featuring the Angela character (hereafter “the *Angela* series”).

31. In addition, Gaiman wrote a portion of the script for issue 26 of *Spawn* (hereafter “*Spawn* Issue 26”).

32. Todd McFarlane Productions and Image Comics published *Spawn* Issue 26 in December of 1994.

33. *Spawn* Issue 26 was shipped for publication by Image Comics on December 27, 1994.

34. Mr. Gaiman is not identified as an author or contributor to the script or story for *Spawn* Issue 26 in any portion of that publication.

35. *Spawn* Issue 26 does not contain a notice identifying the owners of the copyright in Issue 26 or any of the characters in that issue.

36. Mr. Gaiman is the sole author of the scripts for Issues 1, 2, and 3 of the *Angela* series.

37. Mr. McFarlane did not author any portion of the scripts for Issues 1, 2, and 3 of the *Angela* series.

38. Mr. McFarlane did not create any of the artwork for Issues 1, 2, and 3 of the *Angela* series; instead, the artwork for these issues was created for Todd McFarlane Productions by another artist, Greg Capullo.

39. Issue 1 of the *Angela* series was published in December of 1994.

40. Issue 2 of the *Angela* series was published in January of 1995.

41. Issue 3 of the *Angela* series was published in February of 1995.

42. Issue 2 of the *Angela* series contains the following notice: “Angela, its logo and its symbol are registered Trademarks <sup>TM</sup> and copyright © 1995 of Todd McFarlane Productions, Inc. All rights reserved.”

43. Issues 1 and 3 of the *Angela* series contain the following notice: “Angela®, its logo and its symbol are registered Trademarks <sup>TM</sup> 1994 of Todd McFarlane Productions, Inc. All rights reserved.”

44. Issues 1, 2, and 3 of the *Angela* series were republished in a trade paperback entitled *Angela* in November of 1995.

45. A “trade paperback” is a collection of several comic issues published in book form.

46. The inside title page of the *Angela* trade paperback contains the following notice: “Angela, its logo and its symbol are (TM) trademarks and (©) copyright 1995, Todd McFarlane

Prods., Inc. All other characters are (TM) and (©) copyright 1995, Todd McFarlane Prods., Inc. All rights reserved.”

47. Todd McFarlane Productions and Image Comics reprinted *Spawn* Issue 26 in a trade paperback entitled *Spawn Volume 6*, which was published in May of 1998.

48. *Spawn Volume 6* contains the following notice: “*Spawn*, its logo and its symbol are registered trademarks 1998 of Todd McFarlane Productions, Inc. All other related characters are TM and © 1998 Todd McFarlane Productions, Inc. All rights reserved.”

49. Todd McFarlane Productions and Image Comics are currently republishing *Spawn* Issue 26 in a trade paperback entitled *Pathway to Judgement*.

50. Todd McFarlane Productions and Image Comics reprinted *Spawn* Issue 9 in the trade paperback *Spawn Volume 2*.

51. *Spawn Volume 2* was shipped for publication by Image Comics on June 12, 1996.

52. *Spawn Volume 2* contains the following notice: “*Spawn*® and it’s logo and it’s symbol are registered trademarks of Todd McFarlane Productions, Inc. All other related characters are trademark ™ and Copyright © 1996 Todd McFarlane Productions, Inc. All rights reserved.”

53. Larry Marder was the executive director of Image Comics from December 1993 until September 1999.

54. Mr. Marder became president of operations of Todd McFarlane Productions in October 1999. Mr. Marder became president of TMP International in December 2001 and currently holds that title.

✓ 55. After the meeting with Mr. McFarlane and Mr. Marder in the spring of 1996, Mr. Gaiman began phoning Mr. McFarlane regularly with questions about his (royalty payments and) seeking to obtain a written contract.

56. As Executive Director of Image Comics, Mr. Marder reported to the shareholders of that company, including Mr. McFarlane.

57. On April 2, 1997, Mr. Gaiman's attorney, Melanie Cook sent Larry Marder a letter regarding money Mr. Gaiman claimed he was owed as a result of his work for Mr. McFarlane. Mr. Gaiman's attorney attached to the letter copies of unexecuted drafts of two of Mr. Gaiman's D.C. Comics contracts for Mr. Marder's review.

✓ 58. The draft "Character Equity Agreement" dated February 1, 1993 that was attached to Attorney Melanie Cook's April 2, 1997 letter purported to expressly incorporate Mr. Gaiman's April 20, 1988 and January 2, 1990 Sandman contracts and specifically listed the characters for which Gaiman was to receive non-comic-book (royalties.)

59. The Cogliostro character has a speaking role in the live-action "Spawn" movie distributed by New Line Cinema beginning in August 1997.

60. The New Line Cinema Spawn movie has been sold on video cassette and DVD.

61. The Angela character has a speaking role in one of the six episodes that make up the first season of "Todd McFarlane's Spawn", an animated television series produced by HBO.

62. HBO's animated series "Todd McFarlane's Spawn" has been sold on video cassette and DVD.

63. Mr. Gaiman has never been an employee of any of the Defendants.

✓ 64. Mr. Gaiman has never signed a "work-for-hire" agreement with any of the Defendants.

65. “Miracleman” is a comic book superhero with origins older than and unrelated to the Spawn comic book series.

66. Eclipse Comics (which is not a plaintiff or defendant in this case) published the Miracleman comic book series until 1993.

67. The Miracleman comic book series published in the United States consisted of twenty-four comic book issues. Mr. Gaiman wrote each of the last eight issues of the Miracleman comic book series (issues 17 through 24). Mark Buckingham illustrated all of the Miracleman issues authored by Mr. Gaiman.

68. None of the Defendants in this case, including Mr. McFarlane, ever contributed to the creation or publication of any issue of the Miracleman comic book or any reprints of those comic books.

69. Eclipse Comics filed for bankruptcy in 1994.

70. As part of the Eclipse Comics bankruptcy sale, Todd McFarlane Productions bought all of the assets of Eclipse Comics from the bankruptcy trustee. As part of that purchase, Todd McFarlane Productions acquired certain physical property, including film used to create the Miracleman comic books, which had been in Eclipse Comics’ possession and had been used by Eclipse in its publishing of Miracleman.



**C. AGREED STATEMENT OF MAJOR FACTUAL ISSUES**

1. Under copyright law, are Neil Gaiman and Todd McFarlane “joint authors” of the character Cagliostro (or Cogliostro), i.e., was Neil Gaiman’s contribution to the creation of the Cagliostro (of Cogliostro) character independently copyrightable?

2. Under copyright law, are Neil Gaiman and Todd McFarlane “joint authors” of the character Medieval Spawn, i.e., was Neil Gaiman’s contribution to the creation of the Medieval Spawn character independently copyrightable?

3. Would a reasonable person in Neil Gaiman’s position have discovered, more than three years prior to the filing of this action, that Todd McFarlane or Todd McFarlane Productions were claiming to be sole owners of all copyright interests in Spawn Issue 9?

4. Would a reasonable person in Neil Gaiman’s position have discovered, more than three years prior to the filing of this action, that Todd McFarlane or Todd McFarlane Productions were claiming to be sole owners of all copyright interests in Spawn Issue 26?

5. Would a reasonable person in Neil Gaiman’s position have discovered, more than three years prior to the filing of this action, that Todd McFarlane or Todd McFarlane Productions were claiming to be sole owners of all copyright interests in Angela Issues 1, 2 and 3?

6. Would a reasonable person in Neil Gaiman’s position have discovered, more than three years prior to the filing of this action, that Todd McFarlane or Todd McFarlane Productions were claiming to be sole owners of all copyright interests in the characters Angela, Cagliostro (or Cogliostro) and Medieval Spawn?

✓ 7. Beginning in 1992, did Todd McFarlane (on behalf himself or Todd McFarlane Productions) and Neil Gaiman enter into an enforceable agreement that Neil Gaiman would be

compensated for his work in conjunction with Spawn-related comics as well or better than Neil Gaiman's compensation under his contracts with D.C. Comics?

8. If so, did Todd McFarlane or Todd McFarlane Productions breach that agreement?

9. In 1997, did Todd McFarlane (on behalf of himself or Todd McFarlane Productions) and Neil Gaiman enter into an enforceable agreement regarding, among other things, royalties and rights to various comic book characters? If so, what were the terms of that agreement?

10. If so, did Todd McFarlane or Todd McFarlane Productions breach that agreement?

11. Did Neil Gaiman make misrepresentations or omissions of material facts to Todd McFarlane or Todd McFarlane Productions during their contract negotiations in 1996 and 1997?

12. If Neil Gaiman did make misrepresentations or omissions of material facts to Todd McFarlane or Todd McFarlane Productions during their contract negotiations, did they reasonably rely upon those misrepresentations or omissions?

13. Have Todd McFarlane, Todd McFarlane Productions, Inc., or Image Comics wrongfully used a false designation of origin by failing to provide Neil Gaiman with credit for his contribution to Spawn Issue 26 and Pathway to Judgement?

**As to the following factual issues, the parties were unable to reach agreement on precise wording.**

**Plaintiffs:**

Did any of the Defendants obtain Neil Gaiman's consent to include Neil Gaiman's name and biographical information on the covers of *Angela's Hunt*?

**Defendants:**

Did Neil Gaiman consent to the use of his name and biographical information on the covers of *Angela's Hunt*?

**D. PROSPECTIVE FACT WITNESSES**

**Plaintiffs:**

✓ Neil Gaiman  
P.O. Box 366  
Menomonie, WI 54751

✓ Lawrence Marder  
11 Luciana  
Newport Coast, CA 92657

Julaine Claybaugh  
40 West Baseline Rd.  
Tempe, AZ 85283

Sheila Egger  
40 West Baseline Rd.  
Tempe, AZ 85283

✓ Terence Fitzgerald  
40 West Baseline Rd.  
Tempe, AZ 85283

James Valentino or  
other (yet unnamed) 30(b)(6) designee of Image Comics, Inc.  
1071 N. Batavia St.  
Orange, CA 92867

Plaintiffs reserve the right to call as an adverse witness in its case in chief or in rebuttal any witness listed in Defendants' list of prospective witnesses.

**Defendants:**

The Defendants anticipate calling some or all of the following individuals as witnesses in this case:

Todd McFarlane  
12240 South Honah Lee Court  
Phoenix, Arizona 85044

• Neil Gaiman  
P.O. Box 366  
Menomonie, WI 54751

Greg Capullo  
5017 Colonial Drive  
Schenectady, NY 12303

• Julaine Claybaugh  
40 W. Baseline Road, Suite E-105  
Tempe, AZ 85283

Allan Inglis  
15155 Fogg St.  
Plymouth, MI 48170

Defendants reserve the right to call as an adverse witness in their case in chief or in rebuttal any witness listed in Plaintiffs' list of prospective witnesses.

**E. PROSPECTIVE EXPERT WITNESSES**

**Plaintiffs:**

Denis Kitchen  
62 Sand Hill Rd.  
Shutesbury, MA 01072

James Caven  
Virchow, Krause & Company, LLP  
Ten Terrace Court  
Madison, WI 53707-7398

Narrative statements of the background and experience of Plaintiffs' expert witnesses are attached as Exhibit A.

**Defendants:**

Thomas R. Klingele, CPA, CVA  
RSM McGladrey, Inc.  
434 South Yellowstone Drive  
Madison, Wisconsin 53719

Thomas E. Clifford, CPA/ABV, CVA, CMA  
RSM McGladrey, Inc.  
434 South Yellowstone Drive  
Madison, Wisconsin 53719

Narrative statements of the background and experience of Defendants' expert witnesses are attached as Exhibit B.

**F. SPECIAL DAMAGES**

Plaintiffs currently estimate Mr. Gaiman's contract-related damages to be between \$250,263.60 and \$394,862.71.

Plaintiffs currently estimate Mr. Gaiman's damages related to his claims for violation of his right of privacy and misappropriation of his name and identity to be \$45,000.

Plaintiffs' damage calculations are described in the report of Plaintiffs' expert James Caven.

The parties have stipulated that, should Mr. Gaiman prevail on any portion of his copyright ownership claims and the Court order any accounting of profits, that the calculation of

any profits due Mr. Gaiman will be made after trial by an independent accountant selected through a process agreed to by the parties.

**G. PROSPECTIVE EXHIBITS & OBJECTIONS**

Plaintiffs' Revised Exhibit List, with Defendants' accompanying objections, is attached as Exhibit C.

Defendants' (including Image Comics) Revised Exhibit List, with Plaintiffs' accompanying objections, is attached as Exhibit D.

The parties have stipulated that they will exchange demonstrative exhibits on or before Wednesday, September 25, 2002 and that each side may supplement its exhibit list with demonstrative exhibits on or before that date.

**H. DEPOSITIONS TO BE OFFERED AT TRIAL**

Plaintiffs may offer portions or summaries of the depositions of the following individuals: Julaine Claybaugh, ✓ Terri Cunningham, Sheila Egger, Allan Inglis, ✓ Terence Fitzgerald, ✓ Paul Levitz, ✓ Lawrence Marder, Steven Smith, James Valentino (or any other 30(b)(6) designee of Image Comics, Inc.).

Defendants intend to offer at trial excerpts or narrative summaries of the depositions of the following individuals: Paul Levitz, Terri Cunningham, Joe Quesada, Julaine Claybaugh (in the event she does not testify in person), and Allan Inglis (in the event he does not testify in person).

Defendants reserve the right to offer at trial excerpts or narrative summaries of the depositions of any additional witnesses deposed subsequent to the preparation of the above list.

Dated this 16<sup>th</sup> day of September, 2002.

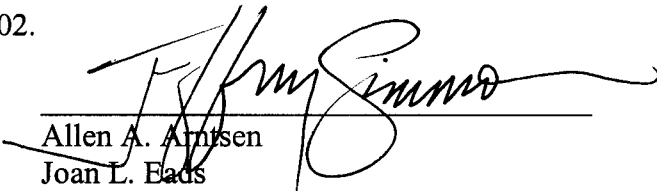
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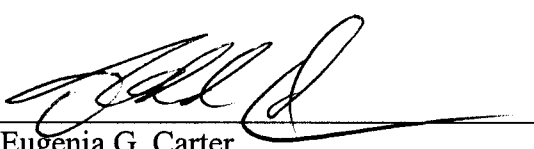
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R. Scott Feldmann

*Attorney for Defendant Image Comics*

Dated this \_\_\_\_ day of September, 2002.

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*Attorney for Defendant Image Comics*